March 6, 2018

VIA ECF
Honorable Lorna G. Schofield, United States District Judge
Thurgood Marshall U.S. Courthouse, 40 Foley Square
New York, New York 10007

Re: *Contant, et al. v. Bank of Am. Corp.*, 17 Civ. 3139

Dear Judge Schofield:

We write on behalf of the Foreign Defendants to respond to Plaintiffs' letter (Dkt. 132) (Feb. 26, 2018) concerning *Charles Schwab Corp. v. Bank of Am. Corp*. ("*Schwab*"), No. 16-1189-cv, 2018 WL 1022541 (2d Cir. Feb. 23, 2018). Contrary to that letter, *Schwab* confirms that the Foreign Defendants' Rule 12(b)(2) motion should be granted because Plaintiffs have failed to make a *prima facie* showing of "suit-related conduct" by the Foreign Defendants that "create[s] a substantial connection with the forum State." *Id.* at *7 (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014)).

First, *Schwab* holds that a defendant's sales of financial instruments into a forum is not, standing alone, sufficient to establish jurisdiction over claims by purchasers that the defendant manipulated a foreign financial benchmark that impacted the pricing of those instruments. The claims in *Schwab* arose out of alleged manipulation of the London Interbank Offered Rate ("LIBOR"). The plaintiffs alleged that the "direct selling" defendants had solicited and sold LIBOR-linked instruments directly to Schwab in California. The Second Circuit held that direct sales of the instruments in California "do not alone create personal jurisdiction for claims premised solely on Defendants' false LIBOR submissions in London." 2018 WL 1022541, at *6–7. The court required that Schwab "show some sort of causal relationship between [the] defendant[s]' U.S. contacts and the episode[s] in suit," and that each of its claims "in some way 'arise from the defendants' purposeful contacts with the forum.'" *Id.* at *7 (citations omitted). Schwab failed those requirements as to its claims based solely on fraudulent manipulation of LIBOR in London, because "the California transactions did not cause Defendants' false LIBOR submissions . . . in London, nor did the transactions in some other way give rise to claims seeking to hold Defendants liable for those submissions." *Id.*[1]

Similarly, Plaintiffs' claims here against the Foreign Defendants are based solely on allegedly collusive activity outside the United States. Indeed, the causal link alleged in this case is even weaker than in *Schwab* because Plaintiffs do not allege a trading relationship with any Defendant (foreign or otherwise) or their affiliates; their suit is based entirely on indirect transactions between Plaintiffs and FX intermediaries. *See* Rule 12(b)(2) Mem. 13–16 (Dkt. 107) (Aug. 11, 2017); Rule 12(b)(2) Reply 2–5 (Dkt. 121) (Oct. 24, 2017).

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[1] The panel did conclude, however, that Schwab made sufficient allegations of "individualized" conduct in the forum to support specific jurisdiction over its state law claims premised on material omissions made by certain defendants during direct sales made to Schwab in California. These allegations supported jurisdiction over state law claims only against the two defendants that "allegedly sold debt instruments *directly*" to "particular" plaintiffs; the claims against other alleged direct seller defendants (including HSBC) failed because they conflated parents and wholly owned subsidiaries. *Id.* (emphasis added).

Second, *Schwab* confirms that Plaintiffs cannot support specific jurisdiction over the Foreign Defendants by conflating their conduct with that of their subsidiaries or affiliates. *Schwab* rejected as "too conclusory" allegations of an "agency" relationship between the indirect seller defendants and the "nonparty broker-dealer subsidiaries or affiliates" that allegedly sold instruments to Schwab in California. A "bare allegation" of "control[]" or "material[] participat[ion]" does not suffice to "impute[]" the broker-dealer contacts to particular defendants. *Id.* at *9. That conclusion, applied here, disposes of Plaintiffs' claims against Barclays, HSBC, RBS, and UBS. *See* Rule 12(b)(2) Mem. 18 & n.16. Indeed, Plaintiffs do not and could not even allege that the FX intermediaries with which they transacted were agents of any Defendant. CAC ¶ 148.

Third, Plaintiffs' claims cannot be saved by their reliance on conduct of alleged co-conspirators of the Foreign Defendants. *Schwab* held that such a "conspiracy theory of jurisdiction" is allowed only if "(1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state." *Id*. at *9 (citing *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013)). Schwab's allegations failed the third element because Schwab did not allege that the co-conspirators had engaged in overt acts in furtherance of the conspiracy in California. The alleged sale of LIBOR-linked instruments in California was insufficient, because those transactions "had nothing to do with" the alleged conspiracy to manipulate the benchmark through false submissions in London. *Id*. at *10. And simply promoting a "financial self-interest is not the same as furthering a conspiracy through [forum]-directed sales." *Id*.[2]

Similarly, Plaintiffs here have failed to allege that any non-Foreign Defendant co-conspirator engaged in overt acts in the United States "in furtherance" of a conspiracy allegedly involving Foreign Defendants, and Plaintiffs therefore fail the third element of the *Unspam* test. Moreover, the conspiracy allegations this Court found plausibly alleged in *FOREX* do not assist Plaintiffs here, because this action concerns Plaintiffs' purported injuries from transactions with the unidentified FX intermediaries, not Plaintiffs' transactions with any Defendant or even any Defendant's agent. Plaintiffs point to no non-conclusory allegations that any of the purported transactions between a Defendant and one of the unidentified FX intermediaries took place in New York or the United States and was within the scope of, or affected, the alleged FX spot market collusion centered in the United Kingdom (CAC ¶¶ 85–88, 176) and continental Europe (CAC ¶¶ 89–90, 176). *See* Rule 12(b)(2) Mem. 20–21; Rule 12(b)(2) Reply 7–8.[3]

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[2] The panel nowhere reached any constitutional question about the conspiracy jurisdiction theory under *Walden*; there was no need to do so given the deficiency in the jurisdictional allegations. *See Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*) ("normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case").

[3] The panel also rejected Schwab's allegations that specific jurisdiction was warranted under the "effects" test, because Schwab offered only the inadequate averment that the California effects of the alleged LIBOR suppression were "foreseeab[le]." 2018 WL 1022541 at *10. That conclusion supports the Foreign Defendants' argument that Plaintiffs here fail the "effects" test. *See* Rule 12(b)(2) Mem. 18–20; Rule 12(b)(2) Reply 7. The *Schwab* panel went on to afford Plaintiffs leave to "clarify the status of the grouped entities" and to replead the "agency and conspiracy theories of jurisdiction." *Id.* at *11–12. Here, Plaintiffs have never even begun to make such allegations, so leave to amend would be futile. Rule 12(b)(2) Reply 10. Moreover, Plaintiffs chose "not to amend [the] [C]omplaint" in response to the Rule 12(b)(2) motion under Rule III.C.2 of this Court's Individual Rules. *Id.*

Dated: New York, New York

Respectfully submitted,

SULLIVAN & CROMWELL LLP

By: /s/ Matthew A. Schwartz
Matthew A. Schwartz
David H. Braff
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
schwartzmatthew@sullcrom.com
braffd@sullcrom.com

Attorneys for Foreign Defendant Barclays Bank PLC

DAVIS POLK & WARDWELL LLP

By: /s/ Joel M. Cohen
Joel M. Cohen
Alyssa B. Gomez
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
joel.cohen@davispolk.com
alyssa.gomez@davispolk.com

Attorneys for Foreign Defendant The Royal Bank of Scotland Group plc

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Eric J. Stock
Eric J. Stock
Indraneel Sur
200 Park Avenue
New York, New York 10166
Telephone: (212) 351-4000
estock@gibsondunn.com
isur@gibsondunn.com

D. Jarrett Arp
Melanie L. Katsur
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
jarp@gibsondunn.com
mkatsur@gibsondunn.com

Attorneys for Foreign Defendant UBS AG

LINKLATERS LLP

By: /s/ James R. Warnot, Jr.
James R. Warnot, Jr.
Adam S. Lurie
Patrick C. Ashby
1345 Avenue of the Americas
New York, New York 10105
Telephone: (212) 903-9000
james.warnot@linklaters.com
adam.lurie@linklaters.com
patrick.ashby@linklaters.com

Attorneys for Foreign Defendant Société Générale

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: /s/ Kenneth A. Gallo
Kenneth A. Gallo
Michael E. Gertzman
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 373-3000
kgallo@paulweiss.com
mgertzman@paulweiss.com

Attorneys for Foreign Defendant The Bank of Tokyo-Mitsubishi UFJ, Ltd.

LOCKE LORD LLP

By: /s/ Gregory T. Casamento
Gregory T. Casamento
3 World Financial Center
New York, New York 10281
Telephone: (212) 812-8325
gcasamento@lockelord.com

Roger B. Cowie
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-6776
Telephone: (214) 740-8000
rcowie@lockelord.com

J. Matthew Goodin
Julia C. Webb
111 S. Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 443-0472
jmgoodin@lockelord.com
jwebb@lockelord.com

Attorneys for Foreign Defendants HSBC Holdings plc and HSBC Bank plc

SIDLEY AUSTIN LLP

By: /s/ Andrew W. Stern
Andrew W. Stern
Alan M. Unger
Nicholas P. Crowell
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 839-5300
astern@sidley.com
aunger@sidley.com
ncrowell@sidley.com

Attorneys for Foreign Defendant Standard Chartered Bank